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No. 02-751

In the Supreme Court of the United States

SUN PRAIRIE, PETITIONER

v.

AURENE M. MARTIN, ACTING ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
THOMAS L. SANSONETTI
Assistant Attorney General
JEFFREY BOSSERT CLARK
Deputy Assistant Attorney General
ELIZABETH A. PETERSON
TODD S. KIM
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether a non-Indian party who negotiates a lease of tribal trust lands subject to the approval of the Department of the Interior under 25 U.S.C. 415 has prudential standing to challenge an administrative decision withdrawing an initial approval decision as invalid.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 286 F.3d 1031 (Pet. App. 1a-15a). The opinion of the district court is reported at 104 F. Supp. 2d 1194 (Pet. App. 16a-58a).

JURISDICTION

The decision of the court of appeals was rendered on April 5, 2002. A petition for rehearing was denied on August 14, 2002 (Pet. App. 59a-60a). The petition for a writ of certiorari was filed on November 12, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner sought to lease tribal trust land of the Rosebud Sioux Tribe for the construction of a large hog farm. The Bureau of Indian Affairs (BIA), an agency within the Department of the Interior, initially approved the lease. Several private groups challenged the BIA's decision, asserting, among other things, that the BIA's lease approval violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* In the face of that lawsuit, the Interior Department determined that the lease approval violated NEPA and was void, which led to dismissal of that suit. Petitioner and the Tribe then brought this suit challenging the Interior Department's withdrawal of the lease approval, and the district court enjoined the Department from enforcing the withdrawal decision. Following a tribal election, the Tribe renounced its support for the suit and joined the other respondents in seeking reversal of the district court's decision. The court of appeals ruled that Sun Prairie lacked prudential standing to bring this suit on its own and remanded the case with instructions to dismiss the complaint for lack of jurisdiction.

1. Section 415(a) of Title 25 recognizes that Indian Tribes may lease tribal lands to private entities and further provides that each such lease must be approved by the Secretary of the Interior, who exercises that authority through the BIA. 25 U.S.C. 415(a); 25 C.F.R. 162.103. Similarly, contracts that encumber tribal lands for a period of seven or more years generally require the approval of the Secretary or her designee. 25 U.S.C. 81.

The BIA's determination to approve a tribal lease is subject to the requirements of NEPA, which requires

federal agencies to examine the environmental effects of specified actions and to inform the public concerning those effects. 42 U.S.C. 4332; see, *e.g.*, *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 97 (1983). NEPA prescribes the necessary process but does not mandate particular substantive results. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350-351 (1989).

Under NEPA, an agency must prepare an environmental impact statement (EIS) whenever it proposes a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. 4332(C); see 40 C.F.R. 1508.27 (providing guidance on what effects are "significant"). An agency may prepare an environmental assessment (EA) to determine whether a proposed federal action will require an EIS. 40 C.F.R. 1501.3, 1501.4. If the agency determines through preparation of an EA that the proposed action will not have a significant environmental effect, the agency may issue a finding of no significant impact (FONSI) and decline to prepare an EIS. 40 C.F.R. 1501.4(b)-(c), 1508.13.

2. In the spring of 1998, petitioner and the Rosebud Sioux Tribe agreed to negotiate a lease for the development of a large hog farm on tribal trust land outside of the Tribe's Reservation, in Mellette County, South Dakota. Pet. App. 3a, 18a. Petitioner envisioned that the facility would have 13 separate sites, house 859,000 hogs per year, require 1,686,000 gallons of water daily, and occupy 1135 acres of land. Gov't C.A. App. 32, 34, 38, 41.

After the Tribe and petitioner submitted the proposed lease for approval under 25 U.S.C. 415(a), the BIA reviewed the proposal under NEPA. Pet. App. 18a; Gov't C.A. App. 23, 25. Based on the EA that a contractor prepared, the BIA later issued a FONSI, concluding that the anticipated environmental effects

were insufficient to warrant an EIS. Pet. App. 2a-3a, 18a. Shortly thereafter, the Tribe and petitioner signed the lease and the BIA approved the transaction. *Id.* at 3a-4a, 18a. Petitioner immediately began construction at the first site. *Id.* at 4a.

3. A coalition of public interest groups and members of the Tribe opposing the project filed a complaint in the United States District Court for the District of Columbia alleging, among other things, that the BIA had not complied with NEPA in connection with approving the lease. Those plaintiffs sought to enjoin the effectiveness of that approval. Pet. App. 4a, 19a. That lawsuit prompted the Department of the Interior to examine the BIA's lease approval decision. The Interior Department determined that the EA did "not fully comply" with the requirements of NEPA and thus provided "an insufficient basis" for the FONSI. *Id.* at 69a-70a. Accordingly, the Interior Department concluded that the lease approval was void for failure to fully comply with NEPA. *Id.* at 70a. Because the Interior Department concluded that the lease approval decision was void, the parties entered into a joint stipulation to dismiss the plaintiffs' suit without prejudice. *Id.* at 4a, 20a.

4. Petitioner and the Tribe then brought this suit in the United States District Court for the District of South Dakota, under the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, to challenge the Interior Department's decision to declare the lease approval void. Pet. App. 4a, 6a, 20a. They claimed that the Interior Department had violated various statutes, including 25 U.S.C. 81, 25 U.S.C. 415, and NEPA. Pet. App. 5a. Petitioner and the Tribe sought injunctive relief and declaratory rulings that the Department lacked authority to declare

the lease approval void and that, even if authorized, the decision was arbitrary and capricious. Pet. 5-6; Pet. App. 4a, 20a. The plaintiffs from the earlier litigation in the District of Columbia intervened as defendants. *Id.* at 4a, 22a.

The district court issued an order and judgment granting a permanent injunction. Pet. App. 16a-58a. The court ruled that, assuming that the agency had authority to reconsider its initial lease approval, the Interior Department acted arbitrarily and capriciously in withdrawing its approval, and that the doctrines of equitable estoppel and laches applied here. *Id.* at 25a-40a. The district court also ruled that the BIA's decision to issue a FONSI rather than prepare an EIS was not arbitrary or capricious. *Id.* at 40a-56a. Based on those rulings, the district court declared that the Interior Department and the intervenors were "expressly restrained, enjoined, and prohibited from taking any actions, other than seeking relief by appeal or other appropriate judicial relief, which actions would have the purpose or consequence of interfering or attempting to interfere with the construction or operation of the project that is the subject of this action." *Id.* at 57a-58a.

5. The Interior Department and the intervenors appealed. Pet. App. 5a. While those appeals were pending, the Tribe held a tribal council election, and the newly elected tribal council withdrew its support for the lawsuit. The Tribe then sought and received permission from the court of appeals to realign itself as an appellant. *Ibid.* Following briefing on a variety of challenges to the district court's decision, the court of appeals concluded that petitioner lacked prudential standing to bring and maintain the suit on its own. *Id.* at 3a, 5a-14a.

The court of appeals concluded that, under this Court's prudential standing doctrine, petitioner could not establish standing to bring suit under 25 U.S.C. 81 and 25 U.S.C. 415 because petitioner had no interests that arguably fall within the zone of interests protected or regulated by those statutes. Pet. App. 7a-9a. The court of appeals reasoned:

> Because the statutes relied upon by Sun Prairie were enacted to protect Indian interests, we believe it would be inconsistent to interpret them as giving legally enforceable rights to non-tribal or non-governmental parties whose interests conflict with the tribes' interests.

Id. at 9a. The court also concluded that petitioner lacked prudential standing under other statutes. *Id.* at 10a-14a. The court of appeals denied a petition for rehearing and for rehearing en banc. *Id.* at 59a-60a.

ARGUMENT

This Court has set out prudential standing principles requiring that federal courts ascertain that plaintiffs are the proper parties to litigate otherwise justiciable controversies. The court of appeals correctly identified those established principles, but did not properly apply them to the specific facts of this case. The court of appeals' decision is accordingly mistaken, but it satisfies none of the usual criteria for this Court's review. The decision does not conflict with any decision of this Court or other courts of appeals, but instead merely reflects a misapplication of settled legal principles to an unusual factual situation. Contrary to petitioner's contentions, the decision does not present any issue of general importance that would warrant this Court's resolution.

1. This Court has recognized prudential limits on the federal courts' exercise of Article III jurisdiction. See, *e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997). Under the doctrine of prudential standing, "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Ibid.* In the case of a suit brought under the APA, the plaintiff must establish that its grievance is arguably within the zone of interests regulated or protected by the statute that would in turn provide the substantive basis for legal relief. See *id.* at 162-163; *Barlow* v. *Collins*, 397 U.S. 159, 164-165 (1970). The Court has further made clear that

> where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

Clarke v. *Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). The plaintiff's interests must be evaluated "not by reference to the overall purpose of the Act in question * * * but by reference to the particular provision of law upon which the plaintiff relies." *Bennett*, 520 U.S. at 175-176.

2. The court of appeals correctly recognized the foregoing principles. Pet. App. 6a-7a. Applying those principles to the Indian lease context, the court also correctly recognized that a would-be lessee of Indian land generally lacks prudential standing to challenge the Interior Department's administrative decision *not* to approve a proposed lease under 25 U.S.C. 81 and 25 U.S.C. 415. Pet. App. 9a. The statutory provisions re-

quiring federal approval of certain contracts and leases "are intended to protect only Native American interests." *Id.* at 8a. They exist to ensure that Indians do not lose control of their trust property through improvident dealings and unconscionable contracts. See *In re Sanborn*, 148 U.S. 222, 227 (1893); *Western Shoshone Bus. Council* v. *Babbitt*, 1 F.3d 1052, 1054-1056 (10th Cir. 1993). Thus, as petitioner acknowledges, non-Indians whose interests conflict with Indian interests generally lack prudential standing under those provisions. See Pet. 15-16.

The court of appeals erred, however, in failing to recognize the significantly different situation that arises once the Interior Department has formally approved a proposed lease, but then withdraws its approval. The Interior Department has the power, inherent in its authority to approve a lease, to reconsider its decision and withdraw its approval. See *United Gas Improvement Co.* v. *Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *Belville Mining Co.* v. *United States*, 999 F.2d 989, 997 (6th Cir. 1993); *Dun & Bradstreet Corp. Found.* v. *United States Postal Serv.*, 946 F.2d 189, 193 (2d Cir. 1991); *Iowa Power & Light Co.* v. *United States*, 712 F.2d 1292, 1296-1297 (8th Cir. 1983), cert. denied, 466 U.S. 949 (1984). "The power to reconsider is inherent in the power to decide." *Eifler* v. *Office of Workers' Comp. Programs*, 926 F.2d 663, 666 (7th Cir. 1991); *Albertson* v. *FCC*, 182 F.2d 397, 399-400 (D.C. Cir. 1950). But when the Interior Department makes the decision to withdraw a previous approval of a proposed lease, the Interior Department does so in the face of the ripened expectations of both the Indian lessor and the non-Indian lessee who may have taken action or made

financial commitments based on the approval. In those circumstances, it is reasonable to conclude that Congress intended that the non-Indian lessee may seek judicial review of the Interior Department's withdrawal decision.

3. As the United States explained in its response to petitioner's petition for rehearing en banc, the court of appeals erred in concluding that petitioner lacked prudential standing to pursue its claim. See Fed. Appellants' Resp. to Sun Prairie's Pet. for Reh'g En Banc 2-7. The United States did not take a position on whether the court of appeals should rehear the case en banc. Instead, the United States urged the court of appeals to grant panel rehearing, recognize its error and decide the merits of whether the Interior Department acted lawfully in withdrawing its approval. *Id.* at 7-10. The court of appeals, however, declined to do so, with only a single judge voting for rehearing en banc. Pet. App. 59a-60a. While the United States submits that the court of appeals should not have relied on prudential standing as a basis for dismissing petitioner's complaint, that court's decision does not warrant this Court's review.

As petitioner implicitly acknowledges, the decision of the court of appeals does not squarely conflict with any decision of this Court or another court of appeals. The court of appeals itself did not identify any controlling precedent, and petitioner does not suggest that the court of appeals' decision has resulted in a conflict among the decisions of the courts of appeals that warrants resolution by this Court. The absence of a conflict is not surprising. The Interior Department does not often withdraw a prior lease approval and, hence, the courts would rarely have any occasion to address whether a non-Indian lessee has prudential

standing to challenge a withdrawal decision that the Tribe itself does not challenge.

Faced with the absence of controlling precedent, the court of appeals applied general prudential standing principles to a novel factual situation before it. The court of appeals correctly identified the controlling legal principles governing the prudential standing inquiry but, in the words of petitioner, "misapplied" them to the facts of this case. Pet. 14. That error does not warrant this Court's review. This Court does not ordinarily grant review to examine a court of appeals' application of settled legal principles to a particular factual situation. See Sup. Ct. R. 10. The Court has no reason to do so in this case, which presents highly unusual facts that are very unlikely to recur.

The prudential standing dispute in this case arose only because: (1) the BIA initially approved a lease between a Tribe and a non-tribal party that was likely to have substantial environmental impacts; (2) the Interior Department later determined, in the face of a third-party's legal challenge, that the NEPA-mandated environmental analysis was inadequate; (3) the Interior Department further determined that approval should be withdrawn because the legal challenge would most likely lead to invalidation of the lease; (4) the Tribe and petitioner initially challenged the Interior Department's action through a second lawsuit, but the Tribe withdrew from that lawsuit at the appeal stage; and (5) petitioner alone sought to continue prosecuting the appeal. There would be little value in the Court's reviewing the court of appeals' application of prudential standing principles to that distinctive situation because that fact pattern is unlikely to recur.

Petitioner suggests (Pet. 10-13) that the court of appeals' application of prudential standing principles in

this case may discourage non-Indian investment and depress economic development in Indian country. We do not believe that that concern warrants review of the issue presented here in the present circumstances, especially in the absence of a circuit conflict. It was a distinctive series of events that led to the court's decision in this particular case and that correspondingly may limit the range of situations in which the issue could arise. Furthermore, since the time that the court of appeals issued its decision, petitioner has filed a new suit challenging the same administrative decision under the Due Process Clause. *Sun Prairie* v. *McCaleb*, Civ. No. 02-3030 (D.S.D. filed Aug. 15, 2002). As a result, it is far from clear that petitioner will not ultimately be able to obtain judicial review of the Interior Department's decision, much less that other potential lessees would be significantly deterred from entering into other leases with Indian Tribes.

Petitioner is also incorrect in characterizing the current circumstances as resulting solely from the Interior Department's "unilaterally withdrawing its previous approval." Pet. 2; see Pet. 10. Petitioner itself shares responsibility for failing to recognize that locating a gigantic hog farm on Indian trust land would require an adequate environmental analysis. The Interior Department withdrew the lease approval in the face of a third-party NEPA challenge that likely would have resulted in the invalidation of the initial lease approval decision. That lawsuit quite plausibly asserted that a project that produced 859,000 hogs per year, required 1,686,000 gallons of water daily, and occupied 1135 acres of land would indeed have a significant impact on the environment, within the meaning of NEPA, and would require an EIS. The Interior Department's decision to declare the lease void simply avoided wasteful litigation

that, in the end, would most likely have led to invalidation of the lease approval and have left petitioner without a valid lease to support its hog farm operation.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
THOMAS L. SANSONETTI
Assistant Attorney General
JEFFREY BOSSERT CLARK
Deputy Assistant Attorney General
ELIZABETH A. PETERSON
TODD S. KIM
Attorneys

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* There is no merit to petitioner's suggestion (Pet. 10) that the hog farm at issue here is itself so exceptionally important that the Court should grant review. Petitioner asserts that it has spent several million dollars thus far and potentially could invest $100 million in the entire project. Pet. 2-4 & n.3, 10. Petitioner, however, chose to proceed with the project despite its awareness that an inadequate environmental analysis could lead to invalidation of the lease. In any event, the decision of the court of appeals does not resolve the fate of the project. The project may yet continue, in whole or in part, depending on factors apart from the outcome of this petition.